

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK,

Petitioner,

v.

ISLAND COUNTY,

Respondent.

CASE No. 17-2-0004

**ORDER FINDING COMPLIANCE AND
CLOSING CASE**

I. INTRODUCTION

On April 14, 2017, the Board issued its Order Finding Non-Compliance (Failure to Act), in which it granted a motion brought by WEAN alleging that Island County had failed to take action to review and, if needed, revise portions of its critical areas development regulations on or before June 30, 2016.

On August 15, 2017, the County adopted Ordinance No. C-86-17, its compliance ordinance. On August 31, 2017, the County filed its Statement of Actions Taken to Comply, providing a copy of Ordinance No. C-86-17 and attached exhibits. The County also filed the compliance index. The Petitioner stipulated to the County's procedural compliance.¹

Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic compliance hearing on October 16, 2017. Board members Nina Carter and Raymond Paoletta attended the hearing. William Roehl convened the hearing as the Presiding Officer. WEAN did not appear for the hearing. Island County appeared through Sarah M. Doar.

¹ Island County's Compliance Report-Statement of Actions Taken and Stipulation as to Compliance, at 2.

II. STANDARD OF REVIEW

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.² After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.³ For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the Growth Management Act (GMA).⁴

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."⁵ Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.⁶ Thus, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the GMA).⁷

III. DISCUSSION

The two issues raised by WEAN in its Petition for Review involved the County's alleged failure to protect critical areas.⁸ Specifically, WEAN stated that it was alleging that the County had failed to take action by June 30, 2016, the date scheduled for the County's critical area review/update, to address the protection of the functions and values of critical areas affected by development allowed following forest practices. WEAN's argument was further clarified as follows:

² RCW 36.70A.300(3)(b).

³ RCW 36.70A.330(1) and (2).

⁴ RCW 36.70A.320(1), (2), and (3).

⁵ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, (1993).

⁶ RCW 36.70A.3201.

⁷ RCW 36.70A.320(2).

⁸ A third issue raised by WEAN was subsequently abandoned. See WEAN's Response to Island County's Motion to Dismiss (April 6, 2017) at 10.

1 Critical area designations and regulations must be reviewed and updated
2 periodically. Island County was required to complete review and update of its
3 critical area regulations by June 30, 2016. It did not. Hence, the County is not
4 in compliance with this GMA requirement. Because the County is currently
5 out of compliance with this statutory deadline its failure to date to adequately
6 regulate development ("conversion") of lands logged without permits
7 disclosing or approving future development is properly subject to Board
8 review. The issues raised in this appeal address this longstanding and
9 ongoing failure.⁹

10 Treating WEAN's motion as one for summary judgment the Board found there was no
11 genuine issue as to any material fact: the County had failed to complete its required review
12 and update by June 30, 2016. WEAN's claim was in essence a "failure to act" allegation.
13 The only relief available in that situation is entry of an order directing the jurisdiction to take
14 the required action. Thus, the matter was remanded to the County to take action to review
15 and, if needed, revise its policies and development regulations for critical areas.

16 The County adopted Ordinance No. C-86-17 by way of compliance. As the
17 ordinance states, with the adoption of that ordinance, " . . . the Island County GMA periodic
18 review and evaluation of critical areas is now complete . . ."¹⁰

19 The County had updated its Fish and Wildlife Habitat Conservation Areas regulations
20 in 2014. Thereafter, it obtained a \$250,000 grant from the Washington State Department of
21 Commerce to assist in its review of the remaining critical area types: wetlands, critical
22 aquifer recharge areas, frequently flooded areas, and geologically hazardous areas. The
23 review process included the retention of a consulting team charged with compiling and
24 reviewing best available science which produced a Best Available Science Report, Existing
25 Conditions Report, Needs Assessment and Gap Analysis. The County also assembled a
26 technical advisory group. As a result of the process, the adopted compliance ordinance
27 includes changes to address water availability, mitigation sequencing for geologically
28 hazardous areas, buffer averaging, temporary impacts to wetlands, and alternative
29 mitigation strategies focused on a watershed scale. Significantly, the County's critical areas
30 regulations have also been consolidated into a single chapter of the Island County Code.
31
32

⁹ WEAN's Dispositive Motion (March 27, 2017) at 2.

¹⁰ Ordinance C-86-17 at 2.

1 The amended code also changed the focus of the County's surface water monitoring
2 program by first establishing baselines and then shifting focus to the monitoring of trends
3 and source identifications. Other critical area regulation changes revised exemptions for
4 existing and ongoing agriculture and made Best Management Practices applicable to Rural
5 zoned properties.
6

7 IV. ORDER

8 Based upon review of the April 14, 2017, Order Finding Non-Compliance (Failure to
9 Act), Island County's Compliance Report-Statement of Actions Taken and Stipulation as to
10 Compliance, and Ordinance No. C-86-17, the Growth Management Act, prior Board orders
11 and case law, having considered the arguments and comments of the parties, and having
12 deliberated on the matter, the Board Orders:
13

- 14 • The action of Island County in adopting Ordinance No. C-86-17 achieved
15 compliance with the April 14, 2017, Order Finding Non-Compliance;
16
- 17 • The matter of WEAN v. Island County, Case No. 17-2-0004 is closed.

18 SO ORDERED this 18th day of October, 2017.
19

20 _____
21 William Roehl, Board Member

22 _____
23 Nina Carter, Board Member

24 _____
25 Raymond L. Paolella, Board Member

26
27 **Note: This is a final decision and order of the Growth Management Hearings Board**
28 **issued pursuant to RCW 36.70A.300.¹¹**
29

30 ¹¹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within
31 ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided
in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it
is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the
parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized
to provide legal advice.